(6)

No. 94-1244

Supreme Court, U.S.
FILED
SEP 25 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

LENARD G. WEISS
Counsel of Record
CHRISTINE A. MURPHY
M. EDWARD ROSS
STEEFEL, LEVITT & WEISS
A PROFESSIONAL CORPORATION
One Embarcadero Center, 30th FL.
San Francisco, California 94111
Telephone: (415) 788-0900
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE *JOHNSON* DECISION DOES NOT AFFECT THE APPEALABILITY OF THE DISTRICT COURT'S ORDER DENYING PETITIONER QUALIFIED IMMUNITY 2

A. Whether The Law Governing The Job-Termination Claims Was Clearly Established, And Whether Petitioner's Conduct Was Objectively Unreasonable, Are Appealable Immunity Issues 4

B. Even If *Johnson* Bars A Sufficiency Challenge On The Employment Interference Claims Under The Circumstances Of This Case, Whether Respondent's Facts Show Objectively Unreasonable Interference Is An Appealable Immunity Issue 8

II. EVEN IF *JOHNSON* REQUIRED THAT ONE SET OF *BIVENS* CLAIMS BE TRIED, THE DISTRICT COURT'S ORDER IS FINAL AND APPEALABLE AS TO THE OTHER *BIVENS* CLAIMS 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 7, 11

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 15

Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989).....5, 6

Green v. Brantley, 941 F.2d 1146 (11th Cir. 1991) ..12, 14

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 6

Hunter v. Bryant, 502 U.S. 224 (1991)..... 5

Johnson v. Jones, 115 S.Ct. 2151 (1995) ..... *passim*

Jones v. Johnson, 26 F.3d 727 (7th Cir. 1994)..... 3

McLaurin v. Morton, 48 F.3d 944 (6th Cir. 1995)..... 13

Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*

Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988) 14

Schrob v. Catterson, 967 F.2d 929 (3d Cir. 1992) 14

Swint v. Chambers County Commission, 115 S.Ct. 1203 (1995)..... 10

Thornburgh v. American Coll. of Obst. & Gyn., 476 U.S. 747 (1986) 10

U.S. v. Gaubert, 499 U.S. 315 (1991) 7, 8

No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

This Court's recent ruling in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), does not dispose of this case, nor does it preclude the Ninth Circuit from asserting jurisdiction over and resolving any of the legal issues petitioner seeks to pursue on appeal relating to the denial of his qualified immunity defense. The only obstacle to petitioner's appeal is the Ninth Circuit's absolute jurisdictional bar against a second pretrial appeal in an immunity case, which the Court granted certiorari to review. The order of the Ninth Circuit dismissing petitioner's appeal solely on the ground that it is barred by the one-appeal rule should

be reversed and the case remanded for consideration of the merits of petitioner's qualified immunity defense.

I. THE *JOHNSON* DECISION DOES NOT AFFECT THE APPEALABILITY OF THE DISTRICT COURT'S ORDER DENYING PETITIONER QUALIFIED IMMUNITY

The district court in this case denied petitioner's motion for summary judgment on the ground of qualified immunity with a bare notation that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claims." Pet. App. 5a. Respondent asserts that in view of the reference to unidentified fact issues, this case falls within the rule the Court announced last term, barring immediate appeal in immunity cases of orders which merely determine "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Johnson v. Jones*, 115 S.Ct. at 2153. The *Johnson* analysis does not apply here because any genuine factual dispute that may exist in this case has no bearing on petitioner's entitlement to qualified immunity. Petitioner seeks to appeal the district court's order on the ground that no clearly established law afforded respondent the legal rights he claims were violated; and that facts in the record which are not disputed are fully adequate to support a qualified immunity determination.[1]

---

[1] In his opposition to the petition for certiorari, filed some months before the *Johnson* decision, respondent asserted flatly that "in the instant case . . . the facts are not in dispute." Resp. Br. [in opposition to petition] at 13. The brief on the merits, filed after *Johnson*, features a lengthy catalog of purportedly disputed

In *Johnson*, respondent Jones claimed the three petitioning police officers beat him or stood by while others did so. The petitioners asserted they had done neither. That, however, was the sole dispute the case presented. All parties and the district court agreed that applicable law clearly forbade engaging in or permitting the kind of physical abuse Jones alleged. All parties and the court agreed also on how the law applied to the two sets of diametrically opposed factual allegations: no reasonable officer could have believed the conduct Jones described was legal. *Jones v. Johnson*, 26 F.3d 727, 727 (7th Cir. 1994). Consequently, Jones's version of events, if proved, would both establish liability and foreclose immunity; while the officers' version, if accepted by a jury, would both preclude liability and moot any immunity issue. The one question the district court decided was whether the record provided enough circumstantial support for Jones's side of the story to justify sending the disputed fact issue to a jury. *Johnson v. Jones*, 115 S.Ct. at 2153-54. The district court held that there was sufficient support.

The issue before the district court in *Johnson*, and the result, would have been exactly the same if the petitioners had been private parties and the word "immunity" had never been mentioned in the case. In that context, the Court declined to permit interlocutory appeal

---

issues. Those "issues," however, are drawn from a factual summary that is virtually devoid of record citations and conflicts significantly with the facts and documentary evidence described by the Ninth Circuit in *Pelletier I*. *Compare* Resp. Br. at 2-7 and 21-24 *with* Pet. App. 11a-15a.

of an order which, "though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* at 2156.

In this case, liability and immunity are not, as they were in *Johnson*, literally two sides of the same coin. Petitioner sought summary judgment on respondent's *Bivens* claims on the ground that at the time in question, no clear law established that respondent had either a constitutionally protected property interest in his contingent employment with Pioneer Savings or, in the circumstances of this case, a protected liberty interest in his reputation; petitioner contended as well that even if the factual record is viewed in the light most favorable to respondent, petitioner could reasonably have believed his conduct, as described in the post-discovery record, was within the law. In short, petitioner's right to qualified immunity does not depend, as it did in *Johnson*, on whether the respondent can persuade a jury to accept respondent's version of any facts that may indeed be disputed.

A. Whether The Law Governing The Job-Termination Claims Was Clearly Established, And Whether Petitioner's Conduct Was Objectively Unreasonable, Are Appealable Immunity Issues

Respondent Pelletier's first set of *Bivens* claims rests initially on the theory that Pelletier had a constitutionally protected property interest in his position as Pioneer Savings' managing officer. Pelletier asserts that he was

deprived of that property interest without due process when the Pioneer board of directors fired him after receiving the May 1986 letter from Pioneer's supervisory agent, petitioner Behrens, declining to proceed with their application for approval of Pelletier's employment until federal savings and loan regulators had completed an investigation into the failure of a thrift where Pelletier had previously held a senior managerial position. If federal law in May 1986 did not clearly provide that Pelletier's employment had such constitutional protection that its termination required due process, Behrens is entitled to immunity regardless of whether a jury could properly find that Behrens' letter in fact infringed such a right. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985); *Hunter v. Bryant*, 502 U.S. 224 (1991).

The facts necessary to establish immunity on the job-termination claims are few, firmly fixed in the record, and indisputable. Respondent Pelletier's position at Pioneer Savings was contingent on regulatory approval because the Federal Home Loan Bank Board had expressly required Pioneer to obtain approval of its managing officer as a condition of receiving federal insurance for its accounts. *Pelletier I*, Pet. App. 12a & n. 2 (setting out the text of Bank Board Resolution No. 84-164, March 29, 1984). Whether Pelletier knew of the condition, or questioned the Bank Board's right to impose it, or felt confident approval would be granted, is irrelevant to the immunity issue. The dispositive immunity question is whether in May 1986 settled law clearly recognized a constitutional property interest in private employment subject to regulatory approval. *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212-14 (5th Cir. 1989). In fact,

the Ninth Circuit signaled strongly in *Pelletier I* that the answer is and must be negative: as of 1992, the court of appeals had "not yet had occasion to consider" the contingent employment issue. Pet. App. 21a.[2]

The district court erred when it concluded that some unidentified factual dispute precluded a finding of immunity on petitioner's motion for summary judgment, and petitioner seeks to correct that error on appeal. The Bank Board resolution that made the employment of any managing officer for Pioneer by definition conditional is indisputable fact. Whether federal law in 1986 clearly recognized that an individual whose employment is subject to such a contingency had a "basic, unquestioned constitutional right[]" to retain the position absent a due-process termination is a pure issue of law. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982); see *Connelly*, 876 F.2d at 1214 ("arguable" right is no basis for denying summary judgment on qualified immunity). The Ninth Circuit plainly had jurisdiction under *Mitchell v. Forsyth*

---

[2] Nor could law clearly affording protection under such circumstances be found elsewhere in May of 1986. Three years after the Behrens letter, the Fifth Circuit found that an individual hired as a bank president had no clearly established property interest in the job he lost when the Comptroller's office, whose approval was required by federal regulation, decided he was unacceptable. The court of appeals observed, "To try to describe [such a] property interest is almost to refute the possibility that it was so clearly established as to abrogate the defendants' qualified immunity." *Connelly*, 876 F.2d at 1213. The Fifth Circuit noted also the "lack of authority in any comparable regulatory setting at the time" to support the banker's property argument. *Id.*

to review that issue before trial, absent the one-appeal rule petitioner challenges here.

While the absence of clearly established law alone provides ample basis for appellate jurisdiction, the objective reasonableness of petitioner Behrens' conduct is a second legal issue which in this case can be determined on appeal and resolved without considering any disputed factual allegations. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (reasonableness is an objective, though fact-specific, question of law to be resolved on summary judgment). The contents of the May 1986 letter that resulted in the termination of Pelletier's employment as managing officer are indisputable. *See* Pet. App. 13a.[3] The letter neither purports to fire Pelletier nor directs Pioneer to do so; it suggests that it "would be appropriate" for Pelletier to "step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Savings is complete." Pet. App. 13a.

Undoubtedly, such a suggestion from Pioneer's supervisory agent carried what this Court in a similar context has called "the power of persuasion." *U.S. v. Gaubert*, 499 U.S. 315, 333 (1991). Under written Bank Board policy, however, "informal supervisory guidance" was an appropriate, and when possible a preferred, mode of effecting management changes. *Id.* at 330, citing Bank Board Resolution No. 82-381 (May 1982). As it confirmed in *Gaubert*, the Court "long ago recognized" that bank

---

[3] Respondent admits in his complaint that the FSLIC investigation referenced in the May 1986 letter resulted, some six months later, in a suit by FSLIC against Pelletier. JA:11-12.

and thrift regulators may properly use informal persuasion before, or in lieu of, resort to the statutory enforcement or removal procedures Pelletier asserts were necessary in view of the protected property interest he claims. *Id.* at 329-30, 333. In that context, it requires no sorting of disputed facts to determine whether a reasonable supervisory agent could have believed it was legal to recommend to Pioneer that it replace, at least temporarily, a managing officer who was being investigated by FSLIC in connection with the failure of a similar institution.[4] *Johnson* does not prohibit the Ninth Circuit from reviewing the district court's implicit legal finding on that issue. The sole bar is the one-appeal rule.

B. Even If *Johnson* Bars A Sufficiency Challenge On The Employment Interference Claims Under The Circumstances Of This Case, Whether Respondent's Facts Show Objectively Unreasonable Interference Is An Appealable Immunity Issue

Respondent Pelletier's second set of *Bivens* claims involves allegations that petitioner Behrens interfered with Pelletier's search for substitute employment after he left Pioneer. On Behrens' first interlocutory appeal, the Ninth Circuit acknowledged a clearly established right on Pelletier's part to pursue his chosen profession free of

---

[4] The fact that respondent Pelletier "has been utterly unsuccessful in causing Mr. Behrens' termination letter to be either withdrawn or retracted by . . . the appropriate federal agencies" (Resp. Br. at 6) clearly indicates the reasonableness of petitioner's belief that his course of action was completely in accordance with accepted regulatory policy and procedures.

government interference. Pet. App. 23a. Pelletier asserts that because the appellate court has already reviewed the question of clearly established law in the context of the interference claims, the only basis for challenging the district court's order with respect to those claims is insufficiency of the evidence – a nonappealable issue under *Johnson*.

Petitioner respectfully submits that the *Johnson* rule may not foreclose review of an evidence-sufficiency question when it is raised, as it would be here, on an appeal that also presents pure questions of immunity law. More importantly, however, petitioner sought in the district court, and seeks to pursue on appeal, a determination on the legal, non-evidentiary issue of whether the activities respondent characterizes as "interference," under the circumstances respondent himself describes, were objectively reasonable as a matter of law.

Petitioner does believe that the district court erred in finding a genuine issue for trial on the claims that Behrens interfered with Pelletier's efforts to find substitute employment in the savings and loan industry. After full discovery, the facts on which Pelletier bases his interference claims are simply an extrapolation from the May 1986 letter that provides the basis for the job-termination causes of action. Pelletier admits that the post-discovery record contains nothing in addition to the letter except (i) Pelletier's testimony that he himself disclosed the letter to prospective employers who inquired about his departure from Pioneer; and (ii) his assertion that it is "customary in the industry to orally 'clear' a senior officer candidate with the 'regulators' " – not Behrens, but other regulatory personnel who, he contends, would have

known about the letter. Resp. Br. at 6. In short, the facts have not expanded beyond the "vague assumptions about informal communications within an industry" that *Pelletier I* warned could not survive summary judgment. Pet. App. 22a. The district court was clearly wrong in denying petitioner's motion; but the *Johnson* rule does not require trial of the interference claims for two reasons.

First, the Court in *Johnson* expressly left open the possibility that a court of appeals, reviewing pure immunity issues such as those raised in connection with the job-termination claims in this case, might properly exercise pendent jurisdiction over a sufficiency of the evidence question as well. *Johnson*, 115 S.Ct. at 2159; *but cf. Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995). If appellate jurisdiction over pendent claims is ever permissible, it is appropriate here, where the plainly appealable job-termination claims and the related employment-interference claims are legally intertwined. *See, e.g., Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 755-57 (1986) (approving appellate review of nonappealable issue closely related to appealable issue).

Further, the court of appeals may review and rule on the objective reasonableness of Behrens' conduct – a legal issue which was not considered on the prior appeal because the appellate court expressly assumed that either discovery would flesh out the nebulous interference theories or the claims would be dismissed on summary judgment. Pet. App. 22a. Neither occurred, however: despite the respondent's failure to adduce any additional "interference" facts through discovery, the district court denied summary judgment on immunity. At a minimum, Behrens is now entitled to an objective reasonableness ruling

based on the completed pretrial record. The court of appeals may make the determination by assuming that Behrens did exactly what Pelletier claims: distributed the May 1986 letter to other regulatory personnel, who in turn might be contacted by prospective employers informally checking Pelletier's credentials. Resp. Br. at 6. Whether a supervisory agent could reasonably have believed that it was legal to route copies of the Pioneer letter to other regulators, notwithstanding Pelletier's clear right to seek other employment in the regulated area, is a legal determination properly reviewed on interlocutory appeal. *Anderson v. Creighton*, 483 U.S. at 639; *Mitchell v. Forsyth*, 472 U.S. at 528.

The ruling in *Johnson* does not affect the court of appeals' ability to review the district court's order denying petitioner Behrens' request for immunity with respect to either Pelletier's job-termination or his employment-interference claims. But for the one-appeal rule, the Ninth Circuit plainly has jurisdiction over the issues raised by petitioner's appeal.

II. EVEN IF *JOHNSON* REQUIRED THAT ONE SET OF *BIVENS* CLAIMS BE TRIED, THE DISTRICT COURT'S ORDER IS FINAL AND APPEALABLE AS TO THE OTHER *BIVENS* CLAIMS

Respondent asserts that if *Johnson* bars an appeal of the interference-with-future-employment claims, it also destroys appellate jurisdiction over the job-termination claims. His theory appears to be that an interlocutory appeal on qualified immunity is permitted under *Mitchell* only when the appeal, if successful, would end the case

completely: if trial is necessary on one *Bivens* claim, the district court's order denying immunity is not final with respect to any *Bivens* claim. Resp. Br. at 24-32.

Both respondent's premise and his conclusion are faulty. As previously discussed, petitioner's appeal raises non-evidentiary immunity issues with respect to the interference claims as well as the job-termination claims. The Ninth Circuit has appellate jurisdiction over each set of claims, in its own right or via pendent appellate jurisdiction, and may reverse the district court's denial of immunity as to both. Thus, it is simply not true that the interference claims have been irrevocably consigned to trial. In any event, neither case law nor the policy enunciated in *Mitchell* requires that a defendant forfeit his trial immunity on one *Bivens* claim merely because another must be resolved by a jury.

The Eleventh Circuit considered this precise issue in an *en banc* opinion and resolved it in favor of the interlocutory appeal right. *Green v. Brantley*, 941 F.2d 1146 (11th Cir. 1991). The plaintiff in *Green* asserted that the defendant FAA officials deprived him of a property right without due process when they revoked his flight instructor's license, and of a liberty interest in his reputation when they allegedly released stigmatizing information about him. The district court denied qualified immunity on both sets of claims. The defendants appealed only the former. Like respondent here, the *Green* plaintiff argued that because the liberty-interest claims would go to trial in any event, there was no appellate jurisdiction over the property-interest claims even if the denial of immunity was erroneous as to that cause of action. *Id.* at 1147-48. The appellate panel agreed.

Rehearing the case *en banc*, the Eleventh Circuit noted that at least nine courts of appeals have held that a civil rights defendant is entitled to an immediate appeal of an order denying immunity on damages claims even when the defendant must face trial in his official capacity on related claims for injunctive relief. *Id.* at 1149 & n.4. It found that the practical and policy considerations recognized in those cases apply as well when the still-pending claims are damages claims against the individual, because the purpose of immunity is " 'to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.' " *Id.* at 1149, *quoting Siegert v. Gilley*, 500 U.S. at 232. The court of appeals concluded:

> If we refused to permit government officials to appeal immediately the denial of qualified immunity when they still face some claim for personal liability damages, we would destroy the right of those officials to be free from the burdens of litigation on those claims from which they are properly immune. In a practical sense, refusing to hear appeals such as this one would effectively abolish qualified immunity for those defendants, clearly frustrating both *Mitchell* and *Harlow* by forcing government officials to litigate claims from which they are immune simply because other claims will proceed to trial regardless. . . . Nothing in *Mitchell* or *Harlow* says that a defendant has a right to qualified immunity only if the plaintiff does not allege other claims from which the defendant has no immunity.

Id. at 1150-51 (citation omitted); *accord McLaurin v. Morton*, 48 F.3d 944, 949 (6th Cir. 1995) (defendant is entitled

to pretrial immunity appeal on fourteenth amendment *Bivens* claim even though eighth amendment claim will be tried); *Musso v. Hourigan*, 836 F.2d 736, 741-42 & n.1 (2d Cir. 1988) (fact that a first amendment *Bivens* claim may have to go to trial does not preclude appeal of related fourth amendment *Bivens* claim); *but see Schrob v. Catterson*, 967 F.2d 929, 939-42 (3d Cir. 1992) (denial of Westfall Act substitution is not immediately appealable if *Bivens* claims remain to be tried).

The reasoning of the Eleventh, Sixth and Second Circuits is consistent with collateral order principles generally, and with the specific purpose of the qualified immunity doctrine. One benefit Congress and the judiciary have sought to achieve by fashioning pretrial review rights is to "simplify, or more appropriately direct, the future course of litigation," and thereby "reduce the burdens of future proceedings" even if those burdens are not eliminated entirely. *Johnson v. Jones*, 115 S.Ct. at 2154. That consideration weighs particularly heavily when the entitlement the appellant seeks to protect is by definition a right to avoid not just trial but "the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. at 526. As the Eleventh Circuit observed, "the pain and suffering that the public official and his family endures while the suit is pending . . . can constantly grind away at the official, seriously impeding the official in the performance of his duties." *Green v. Brantley*, 941 F.2d at 1150. Minimizing that kind of distraction and professional impairment is the fundamental reason for the qualified immunity shield, and permitting review of orders that dispose of less than all claims against the defendant furthers that purpose. *Id.*

It is the one-appeal rule, not *Johnson v. Jones*, that prevents the court of appeals from reviewing the legal immunity issues the district court either decided erroneously or failed to address on petitioner's motion for summary judgment. A single-appeal restriction conflicts with *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Mitchell v. Forsyth*, 472 U.S. 511. The economy and efficiency arguments respondent urges in its support do not outweigh the importance, to public officials and to government processes, of fully enforceable qualified immunity protection. Nor is there a compelling practical need for a rigid limitation in view of the curb imposed by *Johnson*, and the appellate courts' ability to control and sanction genuinely improper appeals under rules and procedures keyed to specific abuses.

CONCLUSION

The order of the Ninth Circuit dismissing petitioner's appeal should be reversed and the case remanded for consideration of the merits of the appeal.

Respectfully submitted,

LENARD G. WEISS
Counsel of Record
STEEFEL, LEVITT & WEISS,
A PROFESSIONAL CORPORATION
Counsel for Petitioner

September, 1995